IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RBC CAPITAL MARKETS CORPORATION, a Minnesota corporation,	:	
Plaintiff,	:	
v.	:	**C.A. No. 4709-VCN**
THOMAS WEISEL PARTNERS LLC, a Delaware limited liability company,	:	
Defendant.	:	

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MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, a Delaware corporation,	:	
Plaintiff,	:	
v.	:	**C.A. No. 4760-VCN**
THOMAS WEISEL PARTNERS LLC, a Delaware limited liability company,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: October 23, 2009
Date Decided: February 25, 2010

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NOBLE, Vice Chancellor

I. INTRODUCTION

This joint memorandum opinion addresses motions filed in related suits between financial institutions and a mutual broker-dealer customer. The plaintiffs in both cases are defendants in related FINRA arbitration proceedings brought by the defendant broker-dealer relating to harm it experienced in the wake of the collapse of the auction rate securities market. Plaintiffs seek to enjoin the defendant from pursuing certain claims that, plaintiffs contend, are brought on behalf of its customers and not itself. Plaintiffs have filed motions for summary judgment as to the arbitrability of the matters in question, while the defendant has moved to dismiss or stay the complaints in favor of the ongoing arbitration.

The central question of these motions is whether the defendant's Statements of Claim in arbitration include claims brought on behalf of its customers in contravention of FINRA provisions mandating arbitration, as plaintiffs contend, or whether plaintiffs improperly seek to preclude the defendant from seeking certain types of equitable relief designed to remedy the harm that it has directly suffered.

II. BACKGROUND

Plaintiff RBC Capital Markets Corporation ("RBC") and Plaintiff Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill") are broker-dealers and members of the Financial Industry Regulatory Authority, Inc. ("FINRA"). FINRA is a private entity that functions as the principle self-regulatory organization for

securities dealers. Defendant Thomas Weisel Partners LLC ("Weisel") also is a registered broker-dealer and member of FINRA. Until February 2008, Weisel regularly purchased auction rate securities from RBC and Merrill, principally for resale to its customers, and now seeks rescission as a possible remedy for the current sustained market collapse in these securities.

A. *The Market for Auction Rate Securities*

Auction rate securities ("ARS") are securities, principally municipal bonds, corporate bonds, and preferred stock, whose interest rates or dividend yields are periodically re-set through auctions that typically occur every 7, 14, 28, or 35 days. While ARS are usually issued with stated intermediate to long-term maturities or else in perpetuity, due to their interest rate or dividend yield re-set feature, ARS are priced and traded as short-term instruments.

RBC and Merrill were among those firms appointed by the issuers of ARS to serve as dealers for the auctions and to manage the auction process. They are paid by the issuer for these services. Traditionally, this is done by way of a broker-dealer agreement between the issuer and the auction dealer.

In carrying out the auction, investors submit orders to buy, hold, or sell ARS through the selected broker-dealers who, in turn, submit all orders to the auction agent—typically a commercial bank—by a specified deadline. Upon collecting the orders, the auction agent determines the amount of securities available for sale and

then organizes the bids in ascending rate orders to determine the winning bid and clearing rate. Thereafter, the auction agent allocates the ARS to the participating broker-dealers based on the orders they submitted. The rate of return set at the auction subsequently applies until the next auction.

In the event that the auction agent does not receive enough orders to purchase all of the ARS available for sale in the auction, the auction is said to have "failed," and the rate on the ARS is set at the maximum rate available for the specific securities being auctioned. Such a failure reduces the liquidity of the ARS by rendering the option of selling the securities at par in a subsequent auction temporarily unavailable.

B. *The Market-wide Collapse of ARS*

As a consequence of the worldwide financial crisis that began in 2007, the market for publicly traded ARS collapsed in February 2008, with auctions failing for more than 87% of all ARS. On February 11, 2008, many (but not all) of the auctions managed by RBC failed as a result of a failure to attract sufficient buyers. On February 13, the ARS auctions managed by Merrill also failed. As a consequence, those investors who held ARS at the time of these failures experienced a drop in the available liquidity of their investment because the ARS effectively no longer operated as short-term instruments.

C. *Enforcement Actions against Merrill and RBC*

As a result of the collapse in the ARS market, both Merrill and RBC were subject to now-settled regulatory investigations into alleged misstatements made by both entities to their customers in the period immediately before the market's collapse regarding its stability.

On July 31, 2008, the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth filed an Administrative Complaint against Merrill, accusing Merrill of perpetuating a massive securities fraud on its customers with respect to the ARS.[1] Specifically, it asserted that Merrill "creat[ed] and implement[ed] a sales and marketing scheme which significantly misstated not only the nature of the [ARS], but also the overall stability of the auction market, resulting in thousands of investors being abandoned with illiquid investments."[2] Additionally, the complaint alleged that Merrill "implemented a series of measures designed to reduce its own exposure to ARS, while providing misleading assurances, primarily through sales calls and research reports, to investors regarding the auction market's outlook and resiliency,"[3] and that "[t]ime after time, when confronted with conflicts of interest, Merrill Lynch

[1] *See* Transmittal Affidavit of Scott W. Perkins, Esq. ("Merrill Perkins Aff.") Ex. F. (filed in C.A. No. 4760-VCN).
[2] *Id.* at 2.
[3] *Id.* at 11.

was consistent in that it placed its own interests ahead of its investor clients."[4] In August 2008, Merrill agreed to a global settlement with the Securities and Exchange Commission ("SEC") and state securities regulators over its ARS activities; without admitting or denying wrongdoing, it agreed to offer to buy back at par the ARS sold to its retail customers. However, no relief was granted to institutional clients, such as Weisel, or to downstream purchasers.[5]

Similar claims were raised against RBC in a lawsuit filed by the SEC on June 3, 2009, in the United States District Court for the Southern District of New York that asserted that RBC knew but failed to disclose the "significant and increasing risks associated with ARS" during the period leading up to the ARS market failure.[6] In a simultaneous settlement, RBC consented (without admitting or denying the SEC's allegations) to a judgment that enjoined it from further violations of the federal securities laws, assessed a civil penalty, and required RBC to offer to purchase all ARS back from "Eligible Customers," which included those who purchased ARS directly from RBC but excluded institutional customers and downstream purchasers.[7] Weisel contends that, although the SEC settlement

[4] *Id.* at 9.
[5] Merrill Perkins Aff. Ex. G.
[6] Transmittal Affidavit of Scott W. Perkins, Esq. in connection with Def.'s Opening Br. in Supp. of its Mot. to Dismiss or Stay ("RBC Perkins Aff.") Ex. B ¶ 20 (filed in C.A. No. 4709-VCN).
[7] RBC Perkins Aff. Ex. C.

required RBC to use its "best efforts" to provide relief to Institutional Customers by December 31, 2009, by way of "issuer redemptions, restructurings, and other reasonable means,"[8] no such relief has been provided to Weisel or its customers.[9]

D. *Weisel Commences a FINRA Arbitration Proceeding Against RBC and Merrill*

On April 3, 2009, Weisel brought arbitration disputes before FINRA against both RBC and Merrill that substantially reflected the allegations in the regulatory complaints, and sought relief for damages that each firm had allegedly caused in connection with its offering and sale of auction rate securities to Weisel and its customers.[10] Weisel's Statements of Claim asserted that RBC had sold over $140 million and that Merrill had sold over $48 million of the securities "to Weisel and its customers,"[11] and that "[d]uring the course of the relationship[s]" between Weisel and RBC and Merrill, Weisel had "continuously relied" upon them "to maintain the auctions that provided liquidity."[12] It asserted further that "[Weisel] justifiably relied on its contractual relationship" with the entities and on their

[8] *Id.* at 8, part VII.
[9] Def.'s Opening Br. in Supp. of its Mot. to Dismiss or Stay ("RBC Def.'s Opening Br.") at 8.
[10] Verified Complaint for Declaratory and Injunctive Relief ("Merrill Compl.") Ex. A. at 1; Verified Complaint for Declaratory and Injunctive Relief ("RBC Compl.") Ex. A at 1.
[11] Merrill Compl. Ex. A at 1; RBC Compl. Ex. A at 1. RBC explained that Weisel purchased approximately $150 million in ARS from RBC and resold approximately $140 million, more than 90% of the total, to its customers. Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss and in Supp. of Pl.'s Mot. for Summ. J. ("RBC Pl.'s Br. in Opp'n") at 6.
[12] Merrill Compl. Ex. A at 5; RBC Compl. Ex. A at 5.

"material misrepresentations and omissions in allowing its customers" to maintain the ARS inventory.[13]

Specifically, Weisel asserted that RBC and Merrill each made material misstatements and omissions concerning "the stability of the ARS market, [their] continued support of auctions for its ARS products, and [their] willingness to commit capital to the auction process in order to facilitate liquidity," at the same time that both companies had "internal, undisclosed plans to cease [their] support for auctions and [were] dumping [their] own inventory into the ARS market."[14] Furthermore, Weisel alleged that Merrill was also "simultaneously pressuring its research analysts to refrain from telling investors what was really going on in the auction marketplace."[15]

E. *Merrill and RBC Challenge Weisel's Claims*

Both RBC and Merrill contested Weisel's Statements of Claim, in whole or in part, on the grounds that Weisel was attempting to bring the claims of its customers within the scope of FINRA's mandatory arbitration provisions by recasting such claims as its own.

On May 14, 2009, Merrill filed a letter Request for Determination of Ineligibility with the FINRA Director of Dispute Resolution, pursuant to FINRA

[13] Merrill Compl. Ex. A at 5-6.
[14] Def.'s Opening Br. in Supp. of its Mot. to Dismiss or Stay ("Merrill Def.'s Opening Br.") at 4-5; RBC Def.'s Opening Br. at 5.
[15] Merrill Def.'s Opening Br. at 5.

Rules 13203 and 13204, under which the Director has the power to "decline to permit the use of the FINRA arbitration forum if 'the subject matter of the dispute is inappropriate.'"[16] Merrill sought to have the Director exercise his power to "decline to permit Weisel to use the FINRA arbitration forum to prosecute rescission claims on behalf of a class of customers who are not party to this proceeding,"[17] and to stay the proceedings until the arbitrability of Weisel's claims could be considered. On May 27, Weisel responded by letter to Merrill's request, outlining the rationale for why the request should be denied.[18] On June 15, 2009, both parties received informal notice from the Director of Dispute Resolution that Merrill's request had been denied and that the case would proceed in arbitration.[19]

Subsequently, on July 16, Merrill filed a Motion to Strike Improper Allegations Concerning Regulatory Investigations and Settlements and to Require a More Definite Statement of Claim.[20] Specifically, Merrill moved to strike all allegations concerning investigations by, and settlements with, securities regulators involving the collapse of the ARS market, contending that this information was irrelevant to Weisel's claims and unduly prejudicial to Merrill.[21] In addition,

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[16] FINRA Rule 13203. Among those disputes that are not within the scope of FINRA arbitration are, for example, class action claims. FINRA Rule 13204.
[17] Merrill Perkins Aff. Ex. A at 2.
[18] *Id.* Ex. B.
[19] *Id.* Ex. C.
[20] *Id.* Ex. D.
[21] *Id.* Ex. D at 1.

Merrill sought to require Weisel to provide information about the misrepresentations and breaches that Merrill had allegedly made, seeking that Weisel be directed to comply with something akin to the heightened pleading standard for fraud claims required under civil procedure rules.[22] On July 24, 2008, Merrill filed its Complaint in this Court.

On July 9, 2009, before making any motions before the arbitration panel, RBC filed its Complaint in its related case in this Court. On July 14, 2009, RBC signed a Submission Agreement conceding to the arbitration with Weisel that included a notice that "RBC does not consent to the submission of any claims brought on behalf of Thomas Weisel Partners LLC's customers" and attaching the Complaint. That day, RBC also submitted its response to Weisel's claims to the FINRA panel.

A panel of arbitrators was selected to hear each case, and the arbitrators in the Merrill action set April 26-30, 2010, as the dates for a hearing on the merits of the arbitration claims.

F. *Relief Sought*

Merrill and RBC ask this Court to: (1) enjoin Weisel from proceeding with the FINRA arbitration to the extent that Weisel seeks to arbitrate disputes

[22] Merrill cited a FINRA Rule that requires the claimant to "specif[y] the relevant facts and remedies requested." FINRA Rule 12302(a)(1).

concerning ARS owned by its customers; (2) stay any arbitration or proceeding before FINRA until this Court determines the proper scope of issues to be decided in that proceeding; and (3) declare that Plaintiffs are not obligated to arbitrate disputes relating to ARS owned by Weisel's customers; (4) grant any such other relief that the Court deems proper, including costs and attorney's fees. Weisel seeks to have Merrill and RBC's claims dismissed or stayed until the completion of the arbitration proceeding.

G. *The Parties' Contentions*

Both RBC and Merrill contend that Weisel's Statements of Claim advance certain claims that effectively belong to Weisel's customers, and thus are outside of the scope of claims properly brought in FINRA arbitration. As a practical matter, RBC and Merrill seek to preclude rescission of the ARS currently owned by Weisel's customers as a permissible remedy since such an award would be outsized relative to the harm that Weisel has suffered and, as RBC and Weisel contend, is principally designed to make Weisel's customers, not Weisel, whole. They further argue that this remedy is outside the scope of what they have consented to arbitrate and functions as a class action claim not permitted under FINRA rules.

Weisel contends that all parties have consented to arbitration; thus, there are no questions of arbitrability available for judicial review at this stage. Further,

Weisel asserts that Merrill is functionally seeking interlocutory review of the FINRA Dispute Resolution Director's June 15, 2009 denial of Merrill's motions to stay the arbitration on grounds identical to those asserted in its complaint, which is not permitted under FINRA rules. Additionally, Weisel contends that a ruling by this Court limiting the types of remedies that the FINRA arbitrators may consider would impermissibly preempt the arbitrators' consideration of those issues of fact and law that the Federal Arbitration Act ("FAA")[23] requires first be decided in arbitration and subject to court review only under the narrow standards set forth in the FAA. Weisel asserts that its motion to dismiss should be granted as a result of FINRA rules and controlling law under the FAA that preclude collateral litigation and preemptive judicial intervention in a pending arbitration where the parties have submitted to the jurisdiction of the arbitrators.

Weisel also argues that any harm predicted by RBC and Merrill is speculative and premature, as the arbitration panel has yet to issue any relief of the nature feared by RBC and Merrill. Moreover, the factual circumstances giving rise to Weisel's requests for equitable relief—a freeze in the market for ARS—may be materially different by the time of the arbitration hearing, making any such award unnecessary or inappropriate. Thus, the Court should neither speculate as to the

[23] 9 U.S.C. § 10(a).

likely outcome of the arbitration nor make any determinations as to matters that are not yet ripe.

Weisel moved to dismiss both cases on these grounds. RBC and Merrill have filed answers to these motions and have, themselves, filed motions for summary judgment as to the arbitrability of all matters concerning the ARS held by Weisel customers. The Court considers all of these motions here.

III. DISCUSSION

A. *The Applicable Standards of Review*

Summary judgment may be granted where the record demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[24] As contractual interpretation is a question of law;[25] this dispute, which, at base, is over the proper scope of the FINRA Code of Arbitration Procedure, is appropriately brought on motion for summary judgment. "Under the plain meaning rule of contract construction, if a contract is clear on its face, the Court should rely solely on the clear, literal meaning of the words and interpret the contract as it would be understood by an objective reasonable third party."[26]

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[24] Ct. Ch. R. 56(c).
[25] *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842, at *6 (Del. Ch. June 13, 2008).
[26] *Francotyp-Postalia AG & Co. v. On Target Tech., Inc.*, 1998 WL 928382, at *6 (Del. Ch. Dec. 24, 1998).

A motion to dismiss for failure to state a claim is granted where "under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."[27] In considering a motion to dismiss, the Court is required to assume the truthfulness of all well-pleaded allegations of fact in the complaint, as well as all inferences that may reasonably be drawn in favor of the plaintiff from such facts.[28] Conclusory allegations, however, are not accepted as true without specific supporting factual allegations.[29]

B. *Must Merrill Wait to Contest the Director's Ruling on Arbitrability?*

As a preliminary matter, although Weisel concedes that Merrill did not waive its right to contest the FINRA Director's ruling on arbitrability, it contends that Merrill must wait until after the FINRA arbitration is completed to bring this claim, and that this action should be stayed until then. To consider this issue, Weisel claims, would be to violate FINRA Rule 13209, which states that "[d]uring an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration,"[30] and, moreover, would constitute an impermissible interlocutory

[27] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).
[28] *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009).
[29] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995).
[30] FINRA Rule 13209.

review of the order by the FINRA Director of Dispute Resolution,[31] who has the power under the FINRA rules to "decline to permit the use of the FINRA arbitration forum if . . . the subject matter of the dispute is inappropriate. . . ."[32]

In making these assertions, Weisel relies most heavily on the *Quixtar* case, where a return to arbitration proceedings was ordered because the court concluded that a valid arbitration agreement existed and that the parties had "'abandoned their efforts to secure a judicial determination of arbitrability and had submitted this issue to the arbitrator' and thereby implicitly agreed to defer judicial review until after the conclusion of the [arbitration]."[33] This was premised on the notion that "a [trial] court should not hold itself open as an appellate tribunal during an ongoing arbitration proceeding, since applications for interlocutory relief result only in a waste of time, the interruption of the arbitration proceeding, and . . . delaying tactics in a proceeding that is supposed to produce a speedy decision."[34]

Setting aside the argument that, for judicial review purposes, the FINRA Director's decision was merely a preliminary matter more properly viewed as of a

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[31] *See, e.g.*, *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (holding that, under the FAA, "a district court does not have the power to review an interlocutory ruling by an arbitration panel").
[32] FINRA Rule 13203.
[33] *Quixtar, Inc. v. Brady*, 328 Fed. Appx. 317, 322 (6th Cir. 2009) (quoting *Quixtar, Inc. v. Brady*, 2008 WL 5386774, at *14 (E.D. Mich. Dec. 17, 2008)).
[34] *Mariforum Shipping,* 624 F.2d at 414 (internal quotation marks omitted).

ministerial nature than as a formal ruling by an arbitrator,[35] parties have routinely been permitted to adjudicate the question of substantive arbitrability while an arbitration proceeding was pending,[36] including within FINRA proceedings subject to Rule 13209,[37] where such a challenge was taken up during the preliminary stages of arbitration. Indeed, as courts are empowered to determine the question of arbitrability, FINRA Rule 13209 cannot function to preclude their use on this threshold question, even where parties otherwise concede to the arbitration, unless they have expressly conceded the question of arbitrability to the arbitrator.

In order to submit the issue of arbitrability to the arbitrator, the party must do so "clearly and unmistakably"[38] or "willingly and without reservation."[39] Simply contesting arbitrability before an arbitration panel does not indicate a clear willingness to submit that issue to the arbitrator.[40] In the *First Options* case, for

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[35] *See* FINRA Rule 13103(a) ("The Director [of Dispute Resolution] shall perform all of the administrative duties relating to arbitration submitted under the Code.") *Cf. Textile Unlimited, Inc. v. A..BMH and Co., Inc.*, 240 F.3d 781, 784 (9th Cir. 2001) (affirming the trial court's preliminary injunction of an arbitration hearing, granted after the arbitrator had already concluded that the case was arbitrable).

[36] *See, e.g.*, *SPC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 760-61 (Del. 1998); *Nagrampa v. Mailcorps, Inc.*, 469 F.3d 1257, 1277-80 (9th Cir. 2006); *Opals on Ice Lingerie, Designs By Bernadette, Inc. v. Bodylines, Inc.*, 320 F.3d 362, 367 (2d Cir. 2003); *Textile Unlimited*, 240 F.3d at 786.

[37] *Citigroup Global Mkts. Inc. v. VCG Special Opportunities Master Fund Ltd.*, 2008 WL 4891229, at *3 (S.D.N.Y. Nov. 12, 2008); *Royal Alliance Assocs., Inc. v. Branch Ave. Plaza, L.P.*, 587 F. Supp. 2d 729, 735 (E.D. Va. 2008).

[38] *Cleveland Elec. Illuminating Co. v. Utility Workers Union*, 440 F.3d 809, 819 (6th Cir. 2006).

[39] *Slaney v. The Int'l Amateur Athletic Fed.*, 244 F.3d 580, 591 (7th Cir. 2001) (citations omitted).

[40] *See, e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) ("[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate

example, the plaintiffs had submitted written objections pursuant to the arbitration rules and thereafter participated in several days of hearings before an arbitration panel, yet such participation was found by the Supreme Court insufficient to support a finding that plaintiffs had "clearly agree[d] to submit the question of arbitrability to arbitration. . . ."[41]

Not surprisingly, the *Quixar* decision turned on the facts because, there, following initial court determinations in October 2007 that the arbitration claimant was likely to prevail on the question of arbitrability, the respondents' counsel expressly stated that the respondent "no longer intended to challenge the arbitrator's jurisdiction over the parties' dispute,"[42] and proceeded with the arbitration process for an additional ten months, engaging in extensive discovery, including the production of hundreds of thousands of pages of documents and the taking of numerous depositions, and during which time the arbitrator issued approximately 15 orders as a result of the parties' extensive motion practice.[43] The parties held a three-day hearing on the question of arbitrability and other motions

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that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point."); *DMS Properties-First, Inc., v. P.W. Scott Assocs., Inc.*, 748 A.2d 389, 392 (Del. 2000) ("The fact that Scott Associates did not seek to enjoin the arbitration and argued the 'arbitrability issue to the arbitrator[s] does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be [effectively] bound by the arbitrators' decision on that point.") (quoting *First Options*, 514 U.S. at 946).

[41] *First Options*, 514 U.S. at 947.

[42] Quixtar, 2008 WL 5386774, at *2.

[43] *Id.*

in February 2008 and the arbitrator issued an order finding a valid arbitration agreement on April 1. In August 2008, after a court in a case with similarly situated plaintiffs granted an interlocutory injunction enjoining the enforcement of the arbitration provisions at issue in the *Quixtar* arbitration, the respondents then took the position that they no longer needed to participate in the arbitration in light of the ruling.[44] In a subsequently filed case by the claimant, the trial court mandated a return to arbitration and declined to review the arbitrator's decision as to arbitrability as inappropriate interlocutory review, finding that the respondents had conceded determination of the question of arbitrability to the arbitrator and had abandoned judicial determination of the same.

In contrast, although Merrill first argued the issue of substantive arbitrability before the FINRA Director of Dispute Resolution, it immediately filed its complaint here after the Director's decision. The fact that it has subsequently filed a motion to strike and for a more definite statement and has engaged in limited discovery in the arbitration proceeding does not indicate that it clearly agreed to submit the question of arbitrability exclusively to FINRA.[45] As Merrill acknowledges that some form of arbitration will go forward, it is not surprising that it has continued to be engaged in arbitration with respect to issues not

[44] *Id.* at *3.

[45] *See also Nagrampa*, 469 F.3d at 1278 (noting that the contesting party's "'participation' in the arbitration proceedings" after objecting to arbitrability "was minimal, limited to procedural issues and undertaking certain actions to preserve her rights," and that this participation did not constitute a waiver of her right to challenge arbitrability in court).

contested here. Nor will the Court find that, by having conceded to some form of arbitration, the Plaintiffs have postponed their opportunity to raise legitimate questions of arbitrability in a judicial forum until after arbitration has concluded. Thus, RBC has likewise not acquiesced in the question of FINRA arbitrability and is also entitled to bring its challenge to the arbitration process here.

C. *The Court's Role in* Arbitration

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute unless he has agreed to do so.[46] The lodestar of arbitration is consent of the parties. The question of whether parties have agreed to arbitrate a particular dispute, *i.e.*, the "question of arbitrability," is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise."[47] Here, the FINRA Rules that govern Weisel's arbitration claims have been interpreted as leaving the question of arbitrability to the courts.[48]

1. Questions of Arbitrability

Although the question of arbitrability is left to the courts, the scope of this review is narrow. As the Supreme Court explained:

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[46] *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 572, 582 (1960).

[47] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). *See also James & Jackson, LLC v. Willie Gary, LLC*, 909 A.2d 76, 78 (Del. 2006) ("The general rule, announced by the United States Supreme Court and followed by this Court, is that courts should decide questions of substantive arbitrability.").

[48] *See, e.g.*, *Cantor Fitzgerald, L.P. v. Prebon Sec. (USA) Inc.*, 731 A.2d 823, 824 (Del. Ch. 1999). This opinion dealt with the National Association of Securities Dealers ("NASD"), the precursor to FINRA.

> Linguistically speaking, one might call any potentially dispositive gateway question a "question of arbitrability," for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The Court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase "question of arbitrability" has a far more limited scope. The Court has found the phrase applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[49]

Courts have gone on to differentiate between issues of "substantive arbitrability" and "procedural arbitrability." Procedural questions are those that "grow out of the dispute and bear on its final disposition," and, thus, "not for the judge, but for an arbitrator, to decide."[50] These issues include "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met,"[51] as well as "allegation[s] of waiver, delay, or a like defense to arbitrability."[52] Additionally, courts have deferred to arbitrators on the question of whether class claims are appropriately brought in arbitration,[53] whether

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[49] *Howsam*, 537 U.S. at 83-84 (internal citations omitted).
[50] *Id.* at 84.
[51] *Id.* at 85.
[52] *Id.* at 84 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983)).
[53] *See, e.g.*, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (holding that questions over whether class claims could be litigated in the arbitration did not turn on whether the parties "agreed" to arbitrate, but "what *kind of arbitration proceeding* [they] agreed to," and that "[a]rbitrators are well situated to answer that question").

an agreement countenances the award of punitive damages,[54] and whether a condition precedent to arbitration had been met.[55]

In contrast, courts have recognized that it is within their purview to determine which claims fall within the scope of an arbitration clause, and thus have been properly brought by an arbitrating party, in accordance with the notion that the essence of arbitration is consent. As this Court previously held, when construing arbitration clauses, "courts must carefully determine which disputes the parties intended to be decided by arbitration and only send to arbitration those disputes that the parties expressly agreed should be arbitrated."[56] Further, while the presumption in favor of arbitration applies to arbitration clauses that expressly limit the universe of claims that can be brought in arbitration—so-called "narrow" arbitration provisions, "the Court must still consider the boundaries of the arbitration provision and not require a party to arbitrate an issue they did not agree to arbitrate."[57] Courts look to the applicable state's contract law and ordinary principles of contractual interpretation in determining whether a given claim falls within a party's agreement to arbitrate.[58]

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[54] *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).
[55] *AT&T Broadband, LLC v. Int'l Brotherhood of Elec. Workers*, 317 F.3d 758, 762 (7th Cir. 2003).
[56] *HDS Inv. Holding Inc. v. The Home Depot, Inc.*, 2008 WL 4606262, at *5 (Del. Ch. Oct. 17, 2008).
[57] *Id.*
[58] *See, e.g.*, *First Options*, 514 U.S. at 944 ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that

Nevertheless, there is still a strong presumption in favor of arbitration once the court concludes that there is a valid agreement to arbitrate, and courts are to defer to the arbitration process in close cases. As explained in *Cantor Fitzgerald*, once it is established that a valid agreement to arbitrate exists:

> When parties to a federal arbitration agreement dispute whether a particular claim or controversy should be litigated in the courts or subject to mandatory arbitration and there is, in fact, doubt as to whether the parties to the agreement ever expected or wanted the claim or controversy to be arbitrated, there is no question federal law requires that the doubt be resolved in favor of arbitration . . . even where, as here, litigation in a court would be faster, more efficient, less costly and more reasonable under all of the circumstances.[59]

2. Post-Award Review of Arbitration and Grounds to Vacate

Arbitration awards are also subject to subsequent judicial review, although, under the FAA, awards may be vacated only on limited grounds, such as where the award was procured by corruption or fraud, where the arbitrators were clearly partial or guilty of misconduct, or where the arbitrators exceeded their powers in granting the award.[60] When tasked with such post-award review, however, courts afford considerable respect to the decisions made by the arbitrator, only setting

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govern the formation of contracts."); *Orner v. Country Grove Inv. Group, LLC*, 2007 WL 3051152, at *6 (Del. Ch. Oct. 12, 2007) ("To determine whether a dispute is governed by a contractual arbitration provision, courts acting under the FAA have been directed by the United States Supreme Court to apply the contract law of the state whose law governs the contract."); *Willie Gary LLC v. James & Jackson LLC*, 2006 WL 75309, at *5 (Del. Ch. Jan. 10, 2006) ("The FAA . . . simply requires that contracts with arbitration clauses be interpreted in accordance with the ordinary principles of contract interpretation. . . .").

[59] *Cantor Fitzgerald*, 731 A.2d at 831.

[60] Federal Arbitration Act, 9 U.S.C. §10(a).

aside an award where the arbitrator acted arbitrarily or capriciously in deciding the merits of the dispute. Consequently, an award is properly vacated where the arbitrator's award evidences "manifest disregard" for the terms of the contract,[61] or where the arbitrator's reasoning is "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling. . . ."[62]

Thus, although a court will not substitute its judgment for that of an arbitrator,[63] it may conclude that the arbitrator exceeded his powers and will therefore refuse to enforce an award if it finds no rational construction of the contract that can support it.[64] However, "as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision."[65]

D. *Does Weisel's Statement of Claim Exceed the Scope of Plaintiffs' Consent*?

As members of FINRA, Weisel, RBC, and Merrill are subject to FINRA's Code of Arbitration Procedures, which regulates the industry and customer

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[61] *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969).
[62] *Safeway Stores v. American Bakery & Con. W.I.U., Local 111*, 390 F.2d 79, 82 (5th Cir. 1968).
[63] *See, e.g.*, *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plaster Workers of Am.*, 461 U.S. 757, 764 (1983) (holding that an arbitration award will not be vacated just because the court believes its own interpretation of the agreement would be better than that of the arbitrator).
[64] *State v. Council No. 81, AFL-CIO, Local 640*, 1981 WL 88253, at *2 (Del. Ch. May 20, 1981).
[65] *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

disputes of broker-dealers. FINRA Rule 13200, the provision that defines the scope of arbitrable claims for industry disputes, provides:

> Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons.[66]

As Weisel, RBC, and Merrill are all FINRA members and Weisel's claims arise entirely out of their business activities, its claims for arbitration are properly brought under this provision of FINRA's rules. Both Merrill and RBC, however, argue that Weisel is impermissibly attempting to arbitrate the claims of its customers, as well, and obtain for its customers relief—rescission of their acquisition of ARS—that they cannot directly pursue against RBC and Merrill. Merrill and RBC contend that the inclusion of rescission as a equitable remedy in Weisel's Statement of Claim is evidence that "what Weisel really seeks to do is assert claims on behalf of a class of investors who purchased ARS through Weisel."[67]

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[66] FINRA Rule 13200. FINRA defines a "Member" as "any broker or dealer admitted to membership in FINRA," or another "self-regulatory organization that, with FINRA consent, has required its members to arbitrate pursuant to the Code and/or to be treated as members of FINRA for purposes of the Code. . . ." FINRA Rule 13100(o). An "Associated Person" includes any "natural person who is registered . . . under the Rules of FINRA," or any "natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member," whether or not exempt from FINRA rules. FINRA Rule 13100(a) & (r).

[67] Merrill Perkins Aff. Ex. A at 2. *See also* RBC Perkins Aff. Ex. A at 2 n.2. However, both Merrill and RBC concede that Weisel's claims for monetary damages, including punitive damages, for interference with its customer relationships, for lost business opportunity, and for harm to its reputation and goodwill are "appropriate for resolution under FINRA's Industry

Although certain disputes between broker-dealers and their customers are subject to mandatory arbitration under FINRA Rule 12200, this rule does not extend to disputes between broker-dealers and the customers of different broker-dealers.[68] Courts have routinely held that the claims of downstream customers of securities brokers are too attenuated to be within the purview of a consent to arbitrate, whether or not these claims would otherwise fall under a mandatory arbitration clause.[69] In addition, FINRA rules expressly prohibit the arbitration of class action claims, which the adjudication of Weisel's customers' claims would

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Code, as are any claims based on securities that Weisel actually owns and holds for its own account." *Id.* at 1. *See also* RBC Compl ¶ 5. They also raise no issue with the arbitrability of any of the specific grounds for relief that Weisel has brought—violation of the federal and state securities laws, common law and statutory fraud, deceit, fraudulent misrepresentation, and negligent misrepresentation, breach of contract, unfair business practices and false advertising, and equitable indemnity.

[68] "Parties must arbitrate a dispute under the Code if: . . . Requested by the customer; [b] The dispute is between a customer and a member or associated person of a member; and [c] The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company." FINRA Rule 12200. *See also Interactive Brokers, LLC v. Duran*, 2009 WL 393827, at *5 (N.D. Ill. Feb. 17, 2009) ("Defendants do not qualify as 'customers' under [the FINRA Rules] by virtue of being 'customers of a customer.'").

[69] *See, e.g.*, *Interactive Brokers*, 2009 WL 393827, at *5 (staying arbitration because the defendants were not customers under FINRA rules); *Herbert J. Sims & Co., Inc. v. Roven*, 548 F. Supp. 2d 759, 766 (N.D. Cal. 2008) (finding the relationship between plaintiffs and defendants "too tenuous to establish a customer relationship and compel arbitration"); *TradeRight Corp. v. Minakhi*, 2007 WL 704528, at *4 (N.D. Ill Mar. 5, 2007) (denying motion to dismiss because plaintiff NASD member might be able to prove that the investor was not the member's customer under NASD rules); *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 177 (2d Cir. 2003) (rejecting the argument that indirect relationships were sufficient to compel FINRA arbitration because so ruling would render the scope of a member's consent impossibly broad, as "every purchaser of shares in a mutual fund and every beneficiary of a pension fund would arguably be 'customers' of every investment institution with which those funds did business, and would be entitled to demand arbitration under the NASD.").

seemingly be.[70] Thus, it is clear that Weisel's customers would not have standing to bring a claim against RBC and Merrill in FINRA arbitration.

Weisel responds that its Statements of Claim are brought in its name only, and not in a representative capacity, that none of the relief it seeks would depend on the assertion of direct claims by its customers against Merrill or RBC, and that none of the individual claims for which it seeks relief is an ineligible class claim. Thus, its claims are fully arbitrable. Weisel concedes that a remedy of rescission would, if awarded, provide an ancillary benefit to Weisel's customers, but asserts that it seeks such a remedy only to rectify the continuing harm it suffers as a result of its customers' illiquidity and reduced ability to trade. Furthermore, Weisel contends that some of its clients "have inappropriately blamed Weisel for the damage," and have closed or moved their accounts, made complaints against Weisel, or initiated arbitrations to recover from Weisel.[71] In essence, Weisel fears its own liability to its customers because of Weisel's relationships with and reliance upon Merrill and RBC.

In the *Cantor Fitzgerald* case, this Court observed that it is the substance of the arbitration claim—not the procedural pretext of who is a named defendant—that matters for purposes of determining whether the asserted claims fall within

[70] *See* FINRA Rule 13204(a) ("Class action claims may not be arbitrated under the Code.").
[71] RBC Def.'s Opening Br. at 5; Merrill Def.'s Opening Br. at 5.

Plaintiffs' consent to arbitrate under the FINRA Rules.[72] RBC and Merrill liken this case to *Cantor Fitzgerald*, where the court held that a claim between two NASD members was not subject to mandatory arbitration where one party's inclusion in the suit was seen as "nothing more than a procedural tactic" to bolster the other party's assertion that the claim—principally involving a non-NASD subsidiary of the first party—needed to be arbitrated. The Court so concluded because it was "obvious from the circumstances and relief . . . in its Statement of Claim" that the party seeking arbitration principally sought to resolve claims associated with the non-NASD subsidiary, not the NASD member.[73]

Both RBC and Merrill contend that Weisel's claims are merely a pretense to bring Weisel's customer's claims against RBC and Merrill into the arbitration forum, in order to shift the responsibilities that Weisel owed its customers over to RBC and Merrill. Along with the fact that Weisel seeks rescission of its customers' transactions, RBC and Merrill cite Weisel's frequent references to its customers in its Statements of Claim as evidence of this pretense, including language suggesting reliance by Weisel's customers on RBC and Merrill's "false

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[72] *Cantor Fitzgerald*, 731 A.2d at 827. In *Cantor Fitzgerald*, the court refused to compel an NASD arbitration because it was obvious from the face of the statement of claim that the claimant had named an affiliated NASD member as a defendant solely to enhance its argument as to the arbitrability of its claims. *Id.*

[73] *Id.* Further, the court noted that the NASD party would not have been a proper plaintiff in a federal court hearing on the matter.

representations and omissions,"[74] and noting that, as a result of the Plaintiffs' abandonment of the auction rate securities markets, Weisel's "customers . . . have been left frozen in illiquid securities ever since."[75] Weisel's pleadings in this case also recognize the persistent harm to its customers, including that, despite RBC's settlement pledge to use its best efforts to remedy harm to institutional investors, "no such relief has been provided to Weisel or its customers."[76]

E. *Does the Inclusion of Rescission as a Possible Remedy Present a Question of Substantive Arbitrability?*

Because RBC and Merrill concede that all of Weisel's grounds for relief are properly brought in arbitration and that some form of arbitration will continue to go forward regardless of this Court's determination here, ultimately, the question before the Court is whether the inappropriateness of a remedy sought can amount to a question of arbitrability permitting judicial intervention into the arbitration process.

The issue of available remedies—to the extent that it has been considered by courts—has been held to be outside of the question of substantive arbitrability available for court adjudication and, thus, is entrusted to the arbitrators as a preliminary matter.[77] Where the claims and arbitrating parties are covered under

[74] Merrill Compl. Ex. A at 5; RBC Compl. Ex. A at 5.
[75] Merrill Compl. Ex. A at 5; RBC Compl. Ex. A at 4.
[76] RBC Def.'s Opening Br. at 8.
[77] *See, e.g.*, *PacifiCare Health*, 538 U.S. at 407 n.2 ("Given our presumption in favor of arbitration, we think the preliminary question whether the remedial limitations at issue here

the relevant arbitration agreements, arbitrators are granted wide latitude to craft appropriate remedies for the harm caused. Once the arbitrators issue a ruling on the matter, Merrill and RBC would be free to take that decision back to our courts to have the decision reviewed to determine whether or not the arbitrators have conferred a remedy outside the scope of their powers, although, as noted above, such a review would be subject to the broad deference generally accorded arbitrators.

Merrill and RBC present a more complicated question: they contend that Weisel's inclusion of the remedy of rescission dramatically expands the de facto scope of their respective consents to arbitrate to include the claims of Weisel's customers, and should not be permitted "merely through a contrived labeling of the parties to that arbitration."[78] Thus, they argue that the inclusion of this remedy implicitly functions to modify the type of claim that Weisel brings—to include claims of its customers—and, as such, raises a question of substantive arbitrability that the Court is empowered to adjudicate.[79]

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prohibit an award of RICO treble damages is not a question of arbitrability.") (citations omitted); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002) ("[I]ssues of remedy go to the merits of the dispute and are for the arbitrator to resolve in the first instance.").

[78] Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss and in Support of Pl.'s Mot. for Summ. J. (Merrill) at 22; RBC Pl.'s Br. in Opp'n at 14.

[79] *See, e.g.*, *Interactive Brokers*, 2009 WL 393827, at *5 (holding that allowing the customers of a FINRA member's customer the use of FINRA's arbitration forum to arbitrate their claims with that member would bind a signatory to an arbitration agreement more expansive than the one it actually signed and thereby "contravene the core principle . . . that an obligation to arbitrate can be based only on consent") (citation omitted).

There may be reason to conclude that rescission with respect to the ARS re-sold to Weisel's clients would be an inappropriate remedy for the claims asserted here. Such a remedy might be perceived to raise serious issues about the risk of a windfall to unrelated parties through the creative pleading of damages, and whether the FINRA member arbitration scheme, which emphasizes a differentiation between customers and non-customers, could be thereby circumvented.[80] In addition, Weisel seeks rescission of the acquisition of securities that it—in large part—does not own,[81] a remedy not permissible under federal securities laws (where the remedy of rescission is commonly sought).[82] A rescissory remedy only functions to make Weisel whole because it grants a windfall to its customers, who are not subject to the FINRA arbitration provisions, only benefiting Weisel as a consequence of its customers' renewed ability to trade in securities and generate trading commissions for Weisel. Furthermore, the grant of such a remedy would presumably not preclude Weisel's customers from,

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[80] *See, e.g.*, cases cited *supra* note 69.

[81] Weisel does continue to hold in its proprietary funds some $10 million in ARS issued by RBC. RBC concedes that Weisel properly seeks their rescission as a remedy in its case. Tr. Oral Arg. at 8, 9, 25.

[82] *See, e.g.*, *Randall v. Loftsgaarden*, 478 U.S. 647, 655 (1986) ("[Section 12(2) of the Securities Act] prescribes the remedy of rescission except where the plaintiff no longer owns the security."); *The Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1031 (9th Cir. 1999) ("If true rescission is no longer possible (perhaps because the plaintiff no longer owns the subject of the sale), the court may order its monetary equivalent."); *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1035 (2d Cir. 1979) ("If plaintiff owns the stock, he is entitled to rescission but not damages. If plaintiff no longer owns the stock, he is entitled to damages but not rescission.").

themselves, bringing suit against RBC and Merrill (although, again presumably, rescission would not be an appropriate remedy).

Weisel argues that such a remedy is appropriately sought because it will free up Weisel customers to trade in other securities and prevent continued harm associated with, for example, its reduced ability to earn trading commissions. Yet, Weisel has provided little support for the notion that an appropriate remedy may disproportionately benefit persons not parties in the case, where that benefit, in turn, provides a consequential benefit to the harmed party, particularly where other, less intrusive measures—such as, for example, an award of damages that compensates for the harm to goodwill and diminished trading volume, instead of rescission—might suffice.

Weisel argues that arbitrators are granted wide latitude in determining proper remedies[83] and cites to a Minnesota Supreme Court case from 1989 involving a contractor hired to construct townhouses for the owner of a parcel of land whose performance was so delayed and shoddy that a number of homebuyers

[83] *See, e.g.*, *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) ("[T]he arbitrator has a plethora of remedies, both legal and equitable, to choose from in structuring a remedy.") (quoting 1 Martin Domke, DOMKE ON COMMERCIAL ARBITRATION § 35:1 (3d ed. 2008)); *Advance Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 361, 374 (Cal. 1994) (holding that arbitrators "may base their decision upon broad principles of justice and equity . . . and make their award *ex aequo et bono* [according to what is just and good]."); *British Ins. Co. of Cayman v. Water Street Ins. Co., Ltd.*, 93 F. Supp. 2d 506, 516 (S.D.N.Y. 2000) ("[A]rbitrators may grant equitable relief that a district court cannot. . . .").

who had purchased units from the owner demanded rescission.[84] Due to concerns over the owner's future warranty liability to downstream homebuyers, the arbitrators imposed a remedy that required the contractor to purchase the entire property from the owner, who in turn had to repurchase certain lots that had already been conveyed to third parties.

The Minnesota Supreme Court rejected the contractor's claim that the admittedly "innovative and unique"[85] equitable remedy exceeded the arbitrators' power, holding that, under the open-ended arbitration agreement between the parties, the arbitrators had "wide and virtually unlimited latitude to fashion a remedy,"[86] and that "implicit in the exceedingly broad powers which were granted by the parties to the arbitrators . . . is a grant of authority to structure an award which is commensurate with the extent, the pervasiveness, and the nature" of the harm suffered.[87] The court did not address the fact that those buyers who had already been conveyed the land were not parties to the arbitration yet directly benefited from the determined remedy.

The question of whether judicial validation of a "sell-back" rescissory remedy granted by an arbitration panel in a mixed ownership land case provides sufficient grounds to conclude that a similar remedy, if adopted by the FINRA

[84] *David Co. v. Jim W. Miller Constr., Inc.*, 444 N.W.2d 836 (Minn. 1989).
[85] *Id.* at 840.
[86] *Id.* at 842.
[87] *Id.*

panel in this case, would not exceed the arbitrators' powers may not properly be determined at this time. Should the panel opt for such a remedy, Merrill and RBC can return to court to bring such a challenge.

Nevertheless, although the Court may have reservations about the propriety of Weisel's request for rescission, it cannot be said that it is obviously outside of the scope of the parties' broad agreement to arbitrate, which does not appear to circumscribe the remedies available in arbitration. Simply because a non-party may be the more appropriate recipient of a given remedy does not ineluctably disqualify the arbitrating party from seeking a comparable remedy itself. The FINRA rules do not provide any limitations on the types or amounts of remedy that parties may seek; indeed, rescission, for example, may be an appropriate remedy for the $10 million in RBC-generated ARS that Weisel still holds. Weisel has put forward plausible grounds for why the remedy of rescission which it seeks may be in order, but that is a question, at least initially, for the arbitrators to decide. Ultimately, the Court must balance its own concerns with this remedy against the broad deference afforded arbitrators. Here, there is no sufficient basis to conclude that Weisel invokes the potential remedy of rescission simply to bootstrap its customers into the arbitration forum. Thus, the remedy of rescission does not necessarily function to expand impermissibly the scope of Plaintiffs' consent to arbitration, necessitating judicial intervention.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motions for summary judgment are denied and Weisel's motions to stay are granted. Counsel are requested to confer and to submit implementing orders.